IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

State of Florida
Office of Financial Regulation,
Plaintiff,
v.
National Senior Insurance, Inc.
et. al.
Defendants,
_____/

Case No.: **50-2021-CA-008718-XXXX-MB**
CIVIL DIVISION

MOTION TO SET ASIDE SETTLEMENT AGREEMENT FOR BREACH OF CONTRACT AND BAD FAITH

Richard Donoff ("Donoff" or "Defendant"), through his undersigned counsel, hereby makes this motion to abrogate the settlement agreement entered into between the Plaintiff and Donoff on March 26, 2024, and in furtherance thereof states as follows:

Breach of Contract

1. Notwithstanding the present motion, Plaintiff first breached the settlement agreement entered into between Plaintiff and Donoff on March 26, 2024 (the "Settlement Agreement"). Plaintiff violated the confidentiality clause (the "Confidentiality Clause") of the Settlement Agreement, attached as Exhibit 2 of Plaintiff's Motion to Approve the Settlement Agreement dated April 26, 2024.

2. The Confidentiality Clause (Paragraph 12) precludes disclosure of: "any of the terms of the settlement of the claim… and/or the facts regarding the claim… including but not limited to the amount of any payment or cooperation…" Moreover, other than responding to an inquiry to say that the claims have been settled, the Parties cannot discuss or disclose the terms of the

settlement, but for complying with a lawful subpoena or a valid court order.

3. In addition, the Parties acknowledged and agreed that the Confidentiality Clause was an essential component of the Settlement Agreement, such that:

> but for this clause, the Parties would not have resolved the claim(s) or entered into this Agreement. In the event any of the Parties breaches or attempts to breach this confidentiality, the breaching Party acknowledges that it may be liable for other claims and damages.

4. Despite these provisions, Plaintiff filed a purportedly "redacted" Settlement Agreement (the "Redacted Version") with the Court. That Redacted Version is more accurately described as an unredacted Settlement Agreement, but for the amount of the settlement, as that is the only portion redacted.

5. Paragraph 8 of the Settlement Agreement headed "Conditions of Enforcement of Agreement.", contradicts Paragraph 12, the Confidentiality Clause, in substantial respects. Paragraph 8 provides for filing with the Court, a Settlement Agreement with the "financial terms" redacted, and an unredacted Settlement Agreement filed "under seal." The stated purpose of these filings, however, is not to enforce the agreement but, rather, to seek court approval of the settlement. Plaintiff falsely asserted that a Redacted Version filed with the court was necessitated by Florida Statute. It was not.

6. The Confidentiality Clause references sections 718 and 720 Florida Statutes, which Plaintiff maintained requires "mandatory disclosure" of a Redacted Version of the Settlement Agreement. Section 718 relates to Condominiums and Section 720 pertains to Homeowners

Associations. Neither extends to matters beyond its stated title nor requires a settlement agreement, redacted or otherwise, to be filed.

7. On April 26, 2024, Plaintiff filed "Receivers Motion to Determine Confidentiality of Court Records and for Approval to file unredacted Settlement Agreement under Seal." Plaintiff's own motion admits (in paragraph 5) that the Settlement Agreement is confidential and sensitive and that the disclosure of financial terms in the public record would disadvantage the Receiver and potentially expose it to loss of attorney work product protections. Notably, Plaintiff's motion makes no mention of the harm Donoff would suffer if the financial terms were disclosed.

8. On July 28, 2023, The Receiver sent a settlement demand to Donoff. That letter noted "possible causes of action" and sought to "claw back" $798,295 of purported commissions from alleged "fraudulent transfers." Paragraph 7 of the Redacted Version leaves unredacted both the $798,295 claw back amount and the allegation of fraudulent transfers. Even presuming that Paragraph 8 supersedes the Confidentially Clause, thus permitting the filing of the entire Settlement Agreement but for the "financial terms", it is difficult to understand how the amount of the settlement constitutes a "financial term" but the demand of $798,295 does not.

9. Moreover, the settlement demand and the fraudulent transfer allegation were both set forth in a confidential settlement communication between counsel. Inserting that language in an unsealed court filing was not only gratuitous but an improper disclosure of settlement negotiations. Donoff is a professional licensed in the state of Florida. Negotiating a Confidentiality Clause with the caveat that the settlement would not have been consummated but for the confidential treatment of its terms, was clearly done to protect Donoff's reputation and avoid possible regulatory scrutiny of unfounded allegations. Plaintiff knew that but disclosed it anyway.

10. There was no statutory reason to file the Redacted Version, particularly since Plaintiff

sought and received court approval to file the unredacted Settlement Agreement, under seal. Filing the Redacted Version served no legitimate purpose.

11. The Fourth DCA, in Anarkali Boutique, Inc., v. Ortiz, 104 So. 3rd (4th DCA 2013) held that:

> "A primary rule of **contract** construction is that where provisions in an agreement appear to **conflict**, they should be construed so as to be reconciled, if possible. In so doing, the court should strive to give effect to the intent of the parties in accord with reason and probability as gleaned from the whole agreement and its purpose." *Arthur Rutenberg Corp. v. Pasin*, 506 So.2d 33, 34 (Fla. 4th DCA 1987) (internal citation omitted).

12. Applying the ruling in Anarkali Boutique, Inc., to the present case, the clear, legitimate intent of the Parties was to keep the terms of the Settlement Agreement confidential. The conflict arises from a wholly unnecessary clause which completely undermines the Confidentiality Clause for no discernable purpose other than to render the Confidentiality Clause meaningless. It is also present under the false heading "Conditions of Enforcement of Agreement." This heading indicates that the language that follows would only be relevant to enforce the agreement, not for the purpose of seeking Court approval. Thus, the Court should construe Clause 8 for what it is, a pre-mediated attempt by the Plaintiff to justify filing the Redacted Version with its unduly narrow and limited redactions.

The Settlement Agreement was in Bad Faith

13. The underpinning of Plaintiff's original Complaint is that pooled insurance policies were sold to investors without being registered with the State of Florida.

14. In Paragraph 6 of its Complaint, Plaintiff alleges that:

The note securities were not registered with the OFR, exempt from registration, or federally covered securities.

15. The federal securities laws are, at times, a complex and interwoven series of rules. One's understanding is often predicated upon grasping the meaning of a referenced rule, which, in turn, can only be understood through the interpretation of yet another rule.

16. Notwithstanding, the primary flaw with Plaintiff's claim, which permeates and taints all other allegations, is the erroneous assertion that the "Note Securities" were required to be registered with the State of Florida through the OFR. They were exempt from registration under state and federal law. The Plaintiff's omission of that fact renders the Complaint as was the case with the Note Securities.

17. Section 517.0611, Florida Statute, essentially provides that the sale of securities in Florida are exempt from registration if they are exempt from registration under the federal securities laws.

18. The use of exemptions to obviate registering a security under federal and state securities laws is extensively relied upon by issuers raising capital in the United States. For context, according to the "Report to Congress on Regulation A/Regulation D Performance as Directed by the House Committee on Appropriation, in H.R. Rept No. 116-122," the amount of capital raised through the exemptions provided by Regulation D for the period 2009-2019 was Thirteen Trillion, Five Hundred and Seventy-Six Billion Dollars ($13,576,000,000,000).

19. As alleged in the Complaint, Seeman and Holtz raised $400,000,000 from 2011 through 2021. To presume that the OFR was incapable of discerning between unregistered and exempt securities is either preposterous or worse. Presumably, the OFR did not mischaracterize the note securities by oversight.

20. The particular exemption utilized to raise capital for the Note Securities was Rule 506(b) of Regulation D, which rendered the Note Securities "federally covered securities." Rule 506(b) permits an issuer to raise an unlimited amount of capital through the sale to an unlimited number of accredited investors, as well as no more than 35 unaccredited investors. Such offerings do have restrictions for advertising and solicitation. See 17 CFR § 230.506.

21. The Complaint makes sparse mention of a Private Placement Memorandum (PPM). Each of the Note Securities had a corresponding PPM. These PPM's set forth the salient features and risks of each respective pooled investment. The PPM's were prepared by well-established law firms and contain all of the requisite information.

22. Fundamentally, the U.S. securities laws are predicated at their core on the concept of disclosure. Simply stated, if an offering document accurately discloses a material fact, it can not be said to be misleading or a misrepresentation. A proper analysis of the PPM'ss for the Note Securities proves that the PPM's contained the necessary disclosures such that the alleged misrepresentations in the Complaint are all unwarranted. This fact would have been apparent had Plaintiff attached the PPM's to the pleading as required pursuant to Rule 1.130 Fla R. Civ. P. That rule specifies that all contracts, documents, and accounts must be incorporated or attached to the pleading. Moreover, "When a party brings an action based upon a contract and fails to attach a necessary exhibit under rule 1.130(a), the opposing party may attack the failure to attach the necessary exhibit through a motion to dismiss" *Samuels v. King Motor o. of Ft. Lauderdale*, 782 So2d489,500 (Fla 4th DCA 2001). Indeed, without the written instrument the Complaint "does not state a cause of action." Id. p. 500.

23. The allegation that the sales force for Seeman Holtz solicited the purchase of the Note Securities is false. Even if they had, however, the sales force would not have needed to be

"registered." Pursuant to Exchange Act Rule 3a4-1, an employee of an issuer who participates in the sale of the issuer's securities would not have to register as a broker-dealer if that person, at the time of participation (1) is not subject to a "statutory disqualification" (2) is not compensated by payment of commissions or other remuneration based directly or indirectly on securities transactions (3) is not an associated person of a broker or dealer and (4) limits its sales activities as set forth in the rule. Moreover, under 3a4-1, issuers are not brokers or dealers because they sell securities for their own account and do not engage in the "buying and selling of their securities.

24. In this case, an over zealous OFR staffer and the Corporate Monitor/Receiver, through their, unjustified preconceived notions of wrongdoing, put the fourth largest insurance company in the State of Florida out of business through the crippling taint of wholly unsubstioned allegation of fraud. Based on knowledge and belief, Plaintiff, caused millions of dollars of losses which would otherwise have been avoided through proper management of the Note Securities by experienced insurance executives; like Seeman and Holtz. This is not mere conjecture; these statements can be corroborated by numerous witnesses who had direct, personal knowledge of the facts and circumstances, at the time.

25. The original Complaint is nothing more than a series of false and misleading statements, out-of-context rule references, erroneous conclusions of law, and the absence of factual predicates. Moreover, the pleadings fail to comply with the requisite heightened pleading standard for fraud.

26. The particular allegations as to Donoff are even more specious. As we now know by virtue of Plaintiff's violation of the Confidentiality Clause, Donoff was accused of receiving $796,295, through fraudulent transfers. The allegations do not stand since, without fraud, there can be no fraudulent transfers.

26. The claimed clawback of $796,295 is absurdly over-inflated. It appears to be the total amount of Donoff's remuneration earned from his employer. Moreover, the proffered damages could be understood for the purpose of intimidation. "If you don't settle with us now, it will cost you tens, if not hundreds of thousands of dollars to defend and your case in court and if you lose, you will owe the full amount of the claim, plus interest, plus cost, plus attorney's fees, plus, plus, plus."

27. The depth of the intimidation and bad faith tactics is even more egregious since there is no evidence that Donoff was paid any amount for selling purportedly unregistered securities. For that matter, there is no evidence that he sold any of the Note Securities at all.

28. Pursuant to Section 726.109 Florida Statute (Fraudulent Transfers), a transfer is not voidable "if made in the ordinary course of business." The notion that Plaintiff has a right to claw back or void every dollar of compensation received by Donoff as "fraudulent transfers" can only be understood for what it is, a shakedown.

29. Ironically, the presumption that Donoff knowingly participated in any wrongdoing through the sale of fraudulent Note Securities is belied by the fact that he personally purchased $200,000 of Grace Holdings, which Plaintiff places much emphasis on, devoting pp. 30-34 of the complaint to that investment.

30. The claims against Donoff are precluded by the applicable statute of limitations. The Note Securities were no longer sold, as of 2019, due to the efforts of the OFR, four years prior to the tolling of claims by the Court. Plaintiff's apparent motion that the statute of limitation is ascended since the Note Securities were serviced by the sales force is a misnomer. Florida and federal securities laws in this regard are limited to "the "offer or sale" of securities, not giving advice. Moreover, the statute of limitation runs from the date of the offer of sale, not any later

date, and there is no tolling on the basis that the claims were not discloused because the Corporate Monitor ordered the Company in 2021.

In conclusion, based on the foregoing, the Donoff settlement should be set aside due to the breach of contract by Plaintiff of the terms of the Confidentiality Clause. The Settlement Agreement should also be set aside on the grounds that the claims against Donoff were pursued in bad faith and the Settlement was obtained under false pretenses and unwarranted intimidation.

Dated: July 29, 20234

Respectfully submitted

Todd A. Zuckerbrod /BW

Todd A. Zuckerbrod, Esq.
FL Bar #0573337
TODD A. ZUCKERBROD, P.A.
40 SE 5th Street, Suite 400
Boca Raton, FL 3342
Telephone: 561.544.8144
Email: tz@tzbrokerlaw.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024 the foregoing was filed using the Florida E-Portal Filing System, which will serve a copy of the foregoing to the Plaintiff electronically upon electronic service.

Dated; July 29, 2024

Todd A. Zuckerbrod /BW

Todd A. Zuckerbrod, Esq.